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— District of Nevada —

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June 23, 2021

The Honorable Richard F. Boulware II  
United States District Court Judge  
United States Courthouse  
333 S. Las Vegas Blvd.  
Las Vegas, Nevada 89101

Re: *Floyd v. Daniels*  
Case No: 3:21-cv-00176-RFB-CLB

To the Honorable Judge Richard. F. Boulware II:

Pursuant to this Court's direction at the June 10, 2021 hearing (ECF No. 96), counsel for Zane M. Floyd presents the following proposed schedule. Further, pursuant to this Court's minute order dated June 11, 2021 (ECF No. 95), the parties held a meet and confer via Zoom on June 15 & 21, 2021 to discuss Mr. Floyd's proposed schedule. While the parties agreed to portions of the proposed schedule, the letter includes disagreements among the parties that the Court will have to resolve. David Anthony and Brad Levenson participated for Mr. Floyd; Randall Gilmer participated for NDOC Defendants, and Crane Pomerantz participated for Defendant Azzam.

**I. Proposed Schedule**<sup>1</sup>

**A. 115 day-schedule**

If a stay/preliminary injunction/temporary restraining order is granted by the Court, Mr. Floyd proposes the following schedule:

**1. June 28, 2021 to July 28, 2021 (30 days)**

- a. Mr. Floyd will issue and litigate the following subpoenas pursuant to Fed. R. Civ. P. 45<sup>2</sup>:

Manufacturer/distributors of drugs used in the lethal injection protocol

Utah Department of Corrections

Mississippi Department of Corrections

Oklahoma Department of Corrections

Federal Bureau of Prisons

Arizona Department of Corrections

Texas Department of Criminal Justice

Idaho Department of Corrections

Missouri Department of Corrections

South Dakota Department of Corrections

Nevada Board of Pharmacy

- b. Mr. Floyd will seek discovery in the following areas:

Materials related to finalized protocol

Materials related to prior 2018 Dozier protocol

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<sup>1</sup> Mr. Floyd proposes two schedules. The first, under subsection (A), gives Mr. Floyd 115 days from June 28, 2021 (the Court's next hearing date) to complete the necessary discovery needed to litigate his amended complaint (to be filed on June 24, 2021). The second schedule, under subsection (B), presupposes an execution date for the week of July 26, 2021, per the State's current order of execution

<sup>2</sup> Mr. Floyd anticipates that obtaining responsive records from third parties will take much longer than thirty (30) days.

Prior evaluations of Floyd and Dozier protocols

Materials related to individuals consulted and documentation reviewed regarding Floyd and Dozier protocols

Presence of attending physician

Drug administrators/execution team members

Assessment of unawareness

Verbal stimulus check

Medical grade pinch

Mixing/storage/transportation of drugs

Setting IV lines

- c. Requests for production/interrogatories – issued on June 30, 2021, to be due on July 30, 2021
- d. Requests for admission – issued on July 29, 2021, to be due on August 29, 2021

**NDOC Defendants' Response To Section I(A)(1)(a)-(d)**

NDOC Defendants continue to oppose either an injunction or stay in this matter. Nonetheless, assuming this Court were to grant an injunction or stay as sought by Plaintiff, and assuming neither the Ninth Circuit nor Supreme Court reverse any stay or injunction granted, NDOC Defendants do not object to the proposed timelines set forth in the above section.

Regarding the Rule 45 subpoenas set forth in section I(A)(1)(a), NDOC Defendants do not object generally to Plaintiff's right to subpoena information from other jurisdictions but reserve the right to make limited objections as necessary and appropriate once served.

As to the areas of discovery set forth in Section I(A)(1)(b), NDOC Defendants reserve the right to make any and all appropriate objections to discovery directed to them, including but not limited to objections based on proportionality and privileges. In this regard, NDOC Defendants incorporate by reference the previous statement

regarding the discovery sought as provided to this Court on May 19, 2021 in ECF No. 76, where Defendants stated:

Defendants understand Plaintiff's intention to seek discovery of the above subjects. Defendants reserve the right to object on a case by case basis, including applicable privileges such as (but not limited to) deliberative process privilege, attorney-client privilege, and work product. Plaintiff may seek discovery into the above categories, subject to these objections as needed on a case-by-case basis. As it relates to proportionality and relevance, Defendants specifically reserve the right and place Plaintiff on notice that they believe information pertaining to the Dozier Protocol is not relevant nor discoverable as it is not proportional to the needs of the case nor likely to lead to relevant information. [ECF No. 76 at 5].

NDOC Defendants agree with the timeline set forth in Section I(A)(1)(c)&(d) pertaining to Requests for Production of Documents, Interrogatories, and Admissions.

**Dr. Azzam's Position As To Section I(A)(1)(a)-(d)**

Dr. Azzam had previously joined in the NDOC Defendants' opposition to an injunction or stay, and takes no additional position on whether the Court should grant or deny such motion. He does not object to the proposed timelines set forth in the section above.

Dr. Azzam's position on the remaining issues is consistent with that of the NDOC defendants. He does not object to the Rule 45 subpoenas, the areas of discovery set forth in Section I(A)(1)(b), and the timeline set forth in Section I(A)(1)(c)&(d) pertaining to Requests for Production of Documents, Interrogatories, and Admissions, but reserves the right to make all appropriate objections, as necessary, on a case by case basis. Dr. Azzam also incorporates by reference the language quoted above from ECF No. 76.

**2. July 29, 2021 to September 12, 2021 (45 days)**

**a. Mr. Floyd will conduct the following depositions:**

Utah Department of Corrections representative most knowledgeable regarding firing squad execution of Ronnie Lee Gardner

(Rule 30(b)(6)) – one day for deposition, two days for travel (Bluffdale, Utah)

William Gittere, Warden Ely State Prison. One day for deposition, two days for travel (Ely, Nevada)

Charles Daniels: Director NDOC. Two days for deposition. (Las Vegas)

Dr. Ishan Azzam, Chief Medical Officer. One day for deposition, two days for travel (Reno/Carson City)

Linda Fox, Pharmacy Director NDOC. One day for deposition (Las Vegas)

Drug administrator(s). Two days for depositions, potential two days for travel (depending on location)

Attending physician – one day for deposition, potential two days for travel (depending on location)

Medical services personnel/medical personnel. Two days for depositions due to multiple deponents, potential two days for travel (depending on location)

EMT/IV Team – Two days for depositions due to multiple deponents, potential two days for travel (depending on location)

Coroner for White Pine County – one day for deposition, two days for travel (Ely, Nevada)

Designated Deputy Director. One day for deposition, potential two days for travel (depending on location)

Kittrell Garlock and Associates (Designer of execution chamber) representative most knowledgeable regarding maintenance of the execution chamber (Rule 30(b)(6)). One day for deposition (Las Vegas)

b. Mr. Floyd will continue discovery as outlined above.

c. Fed. R. Civ. P. 26(a)(2) disclosures due August 19, 2021.

**NDOC Defendants' Position As To Section I(A)(2)(a)-(c)**

NDOC Defendants do not object to the deadline set forth in Section I(a)(2)(c) for Rule 26(a)(2) disclosures and agree to the **August 19, 2021** date. NDOC Defendants take no position as to Section I(a)(2)(b) other than to reserve their rights to object to discovery they believe is unnecessary, irrelevant, nonproportional to the needs of the case, or would invade applicable privileges.

As to Section I(A)(2)(a), NDOC Defendants object to Plaintiff's request to take more than ten (10) depositions, as more than ten depositions will require leave of this Court. Fed. R. Civ. P. 30(a)(1),(2). NDOC Defendants do not stipulate such relief at this time. Without Plaintiff seeking leave of the court based on an individualized and particularized reason why any individual seeking to be deposed after the presumed limit of ten is necessary and appropriate in this case. Unless and until Plaintiff moves for leave, NDOC Defendants do not know whether they can stipulate to the request.

NDOC Defendants also object to Plaintiff's proposed depositions to the extent they seek to depose any individual over more than one day or for a total exceeding seven (7) hours. Rather, NDOC Defendants maintain that any deposition sought by Plaintiff can presumptively be completed in "1 day of 7 hours" as set forth in Fed. R. Civ. P. 30(d)(1).

NDOC Defendants also object to Plaintiff's request to take the depositions of the Attending Physician, EMTs, and Drug Administrators. Case provides that Plaintiff has no right to know the identity of the individuals that will be part of the execution team. *See generally Pizzuto v. Tewalt*, \_\_\_ F.3d. \_\_\_, 2021 WL 1904595 (9th Cir. 2021). To the extent Plaintiff needs or desires certain information regarding the training and skills of these individual(s), NDOC Defendants are willing to provide such information anonymously and is also open to providing certain information to

Plaintiff or his counsel subject to the agreed upon Protective Order issued in this case. ECF No. 87.

**Dr. Azzam's Position As To Section I(A)(2)(a)-(c)**

Dr. Azzam's position is consistent with the NDOC Defendants in all material respects, except that he takes no position with regard to the depositions of the Attending Physician, EMTs, and Drug Administrators.

**Mr. Floyd's Position as to Section I(A)(2)(a)-(c)**

As to the drug administrators, medical personnel, and IV team members, more than one day is requested as there are likely multiple individuals who occupy each position. As such, Mr. Floyd's request does not contravene FRCP 30(d)(1). As to Director Daniels, more than seven hours for a deposition should be permitted by the Court if needed to fairly examine Daniels.

Mr. Floyd does not necessarily seek the identity of the execution team members above but does intend to depose them regarding their backgrounds, experience, qualifications, and training. Courts routinely permit such depositions of execution team members to be conducted anonymously. Mr. Floyd objects to NDOC's proposal to provide such information without a deposition as it is not an adequate substitute for a deposition.

**3. September 13, 2021 to October 13, 2021 (30 days)<sup>3</sup>**

- a. Mr. Floyd will conduct a site inspection of Ely State Prison (*see* B.1., below)
- b. Week-long evidentiary hearing the week of October 4, 2021.

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<sup>3</sup> Mr. Floyd has requested to appear before the State Board of Pardons on September 21, 2021.

1. Mr. Floyd will present expert witnesses and call various witnesses (number to be determined).

**NDOC Defendants' Positions Regarding Section I(A)(3)**

NDOC Defendants have no objection to either a site inspection or an evidentiary hearing within this timeframe. NDOC Defendants have not been able to confirm the precise date of the week of October 4, 2021, but agree in principle to this timeline and tentative date. As it relates to expert witness(es), NDOC Defendants request each party be permitted to have out of state experts attend any evidentiary hearing via video conference should the date selected by the Court conflict with their ability to travel. Please note NDOC Defendants seek this request in an abundance of caution as it would be their desire to have their experts testify in person, however, given the importance to not have this case be delayed, NDOC Defendants request this contingency should it become necessary.

**Dr. Azzam's Positions Regarding Section I(A)(3)**

Dr. Azzam's position is consistent with the NDOC Defendants in all material respects. At this juncture, he does not anticipate utilizing an expert witness and, thus, takes no position on whether such experts should appear in person or remotely.

**Mr. Floyd's Position as to Section I(A)(3)**

Due to the gravity of the issues to be decided, Mr. Floyd expresses a strong preference in favor of live in court testimony by the witnesses.

**B. Execution the week of July 26, 2021**

If the execution takes place the week of July 26, 2021, Mr. Floyd will be limited to the following:



1. Site inspection of the Ely State Prison execution chamber the week of July 12, 2021.<sup>4</sup>
  - a. Participants to include the Court (and court staff including court reporter), counsel for Mr. Floyd, Mr. Floyd's expert(s), and counsel for Defendants.
  - b. Scope of site inspection to include: (1) the execution chamber; (2) adjoining medical room where the lethal drugs will be prepared and administered; (3) the holding cell for Plaintiff; and (4) other matters
2. Fed. R. Civ. P. 26(a)(2) disclosures due July 12, 2021.
3. Four-day evidentiary hearing the week of July 19, 2021.
  - a. Mr. Floyd will present expert witnesses (to be determined) and call as witnesses Director Daniels, Dr. Azzam, and Linda Fox.
4. Requests for production – will be issued to NDOC and DHHS on June 30, 2021 and will be due July 9, 2021. Interrogatories and requests for admission will be completed on dates to be determined.

Counsel for Mr. Floyd intends to group together depositions for witnesses in the same location, which could reduce travel time.

### **NDOC Defendants' Position Regarding Section I(B)**

NDOC Defendants have no objections and agree to Plaintiff's request for a site inspection (I(B)(1)(a),(b)) and will accommodate Plaintiff's counsel's schedule in this regard.

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<sup>4</sup> Mr. Floyd may need to request the site inspection to occur during the weekend of July 10-11, 2021, based on the availability of his experts.

NDOC Defendants also have no objection and agree to Plaintiff's July 12, 2021 date for Rule 26 disclosures or the dates for the requests for production of documents as set forth in Section I(B)(2) and (4) under this alternative schedule.

Should no stay or injunction be issued by this Court, the Ninth Circuit or Supreme Court, NDOC Defendants do not believe an evidentiary hearing would be necessary. They therefore reserve the right to object to such a request.

NDOC Defendants also note the need for flexibility regarding this date given the inability to know the availability for everyone's schedule for the July 19, 2021. NDOC Defendants are aware that Director Daniels has a long-standing professional commitment the week of July 19, 2021, but believe his testimony may be able to be taken on July 19, 2021 in person. NDOC Defendants would also make Director Daniels available for a *de bene esse* deposition to be used for evidentiary hearing purposes should his schedule not permit him to be available the week of July 19, 2021 should the Court order an evidentiary hearing for the week of July 19, 2021.

NDOC Defendants also note that given the July 19, 2021 proposed, video conference testimony may also be necessary for any potential expert witnesses of either party.

**Dr. Azzam's Positions Regarding Section I(B)**

Dr. Azzam's position is consistent with the NDOC Defendants in all material respects, except that he takes no position on the scheduling of Director Daniels' testimony and/or deposition. In addition, Dr. Azzam reserves the right to make all appropriate objections, as necessary, on a case by case basis to discovery requests and questions asked during a deposition and/or evidentiary hearing.

**Mr. Floyd's Position Regarding Section I(B)**

Mr. Floyd objects to the use of deposition testimony for Director Daniels in lieu of live testimony at the hearing.

DATED this 23rd day of June, 2021.

Respectfully submitted:

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